

U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive, Suite 300
Newport News, Virginia 23606-1904

TEL (757) 873-3099
FAX (757) 873-3634



Date: January 17, 2001

Case No.: **2000-LHC-0124**

OWCP No.: **5-54241**

In the Matter of:

CELESTINE HAWKINS,
Claimant,

v.

**NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,**
Employer/Self-Insured.

DECISION AND ORDER GRANTING BENEFITS

This proceeding arises from a claim filed under the Longshore and Harbor Workers' Compensation Act (hereinafter "the Act"), as amended, 33 U.S.C. 901 et seq.

A formal hearing was held before the undersigned Administrative Law Judge on May 10, 2000 in Newport News, Virginia. The parties presented evidence and their arguments at the hearing, as provided by the Act and the applicable regulations. The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

Stipulations¹

¹The following abbreviations will be used as citations to the record:

Ex.- Employer's exhibits.

Cx.- Claimant's exhibits.

Tr.- Transcript of the hearing held on May 10, 2000 before Administrative Law Judge Richard K. Malamphy.

Claimant, Celestine Hawkins, and Employer, Newport News Shipbuilding and Dry Dock Company (hereinafter "NNS"), stipulated to the following facts:

1. That an employer/employee relationship existed at all relevant times;
2. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;
3. That Claimant sustained an injury to her back arising out of and in the course of her employment on March 25, 1985;
4. That a timely notice of injury was given by Claimant to Employer;
5. That a timely claim for compensation was filed by the employee;
6. That Employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;
7. That Claimant's average weekly wage at the time of the injury was \$358.30, resulting in a compensation rate of \$238.87;
8. That Claimant has been paid compensation benefits as documented on the enclosed LS-208 dated 6/19/97;
9. That Employer provided Claimant with medical services as required by 33 U.S.C. 907 (1998);
10. That Claimant has been unable to return back to her pre-injury employment with Newport News Shipbuilding since March 13, 1989.

The undersigned accepts the stipulations stated above. The undersigned notes that the parties originally agreed to the issues of permanency and total disability. (Cx. 5-1.) Both Claimant and Employer exchanged stipulations. (Cx. 14-1, 15-1.) Claimant signed and returned Employer's stipulations with one modification. (Cx. 15-2, 17-2.) However, Employer chose not to sign the modified stipulations. Therefore, the Court must rely on the stipulations presented at the hearing. (Tr. at 11-12.)

This order will address whether Claimant is entitled to permanent total disability or permanent partial disability in compensation for her March 25, 1985 work injury.² For the reasons stated below, the undersigned FINDS that Claimant is entitled to permanent total disability under the Act.

Issues

1. Whether the position at Smart Telecommunications constitutes real employment.
2. If so, whether the position is suitable alternate employment.

Findings of Fact

Testimony of Celestine Hawkins

Celestine Hawkins is a fifty-three year old employee of NNS (hereinafter “NNS”). (Tr. at 205.) She completed the 11th grade, but did not graduate from high school. *Id.* Ms. Hawkins stated that she left high school two months prior to graduation. (Ex. 1d.) She took the test for her GED approximately four times before she passed. (Tr. at 225.) According to Ms. Hawkins, she earned her GED “with help.”³ *Id.*

Hawkins began her employment at NNS in 1979 as a pipe coverer. (Tr. at 206.) After four or five years, she transferred to the cleaning department where she worked until she injured her back in 1985. *Id.* After her injury, Ms. Hawkins returned to work at NNS and began working in a shop where she passed out materials and helped clean employee eyeglasses. (Tr. at 207.) After the shop closed, she transferred to another department where she worked outside picking up papers and cleaning the Yard. *Id.* In 1990, Ms. Hawkins stopped working because her medical restrictions precluded her employment.⁴ (Tr. at 207-208.)

² According to the most recent LS-208 in the record, Employer paid permanent total disability payments from April 17, 1996 through April 18, 2000. On April 19, 2000, Employer began paying Claimant permanent partial disability based on Claimant’s position with Smart Telecommunications. (Cx. 27)

³ Although Ms. Hawkins did not admit to cheating on the test for her GED, she did state that her girlfriends took the test with her and that she received “help” to pass the test. (Tr. at 225-226.)

⁴ Ms. Hawkins has not worked since 1990. (Tr. at 208.)

According to a letter dated February 20, 1997, Dr. Morales, Ms. Hawkins' orthopedic surgeon, determined that Ms. Hawkins had reached maximum medical improvement. (Cx. 1-3.) At that time, he stated that:

[s]he has substantial residuals and given her age and her physical condition, I do not believe the patient is a candidate for the job market. She has to take medications intermittently [which] prevent her from thinking clearly and which will make her sleepy. She cannot stand or sit for prolonged periods of time...For all practical and realistic purposes, the patient is permanently and totally disabled....
(Cx. 1-3, 1-4.)

In 1998, Dr. Morales removed part of a disk in Ms. Hawkins' lower back. (Tr. at 208.) She still has severe pain down her legs and in the lower middle part of her back. (Tr. at 208-209.) She takes Dapro and Tylenol on a regular basis for pain management. (Ex. 1m, 1n.) Hawkins cannot drive a car for long distances or for long periods of time because the pain in her back bothers her after about a half-hour to an hour. (Ex. 1e, 1f.) Basic activities like walking and household cleaning can trigger the pain and sometimes Ms. Hawkins experiences pain even if she does nothing. (Tr. at 209.) She must frequently reposition herself to avoid pain in her back. (Ex. 1l.)

Ms. Hawkins began working for Smart Telecommunications (hereinafter "Smart") approximately four weeks prior to the hearing.⁵ (Tr. at 226.) Her daughter helped her fill out the application for the position. *Id.* Although Ms. Hawkins wrote down the information by herself, her daughter read the application and told her what to write and how to spell certain words. *Id.* On that application, Ms. Hawkins stated that she attended high school for four years; however, she did not include a graduation date. (Ex. 5.)

A representative from Smart interviewed Ms. Hawkins for the position by phone. (Ex. 8c.) Following the interview, Ms. Winschel, an employee of Expediter Corporation (hereinafter "Expediter"), sent the job description to Dr. Morales for his approval. (Cx. 1-23.) According to his report dated March 20, 2000, Dr. Morales reviewed the job description for the customer-service/surveyor position. *Id.* He opined that Ms. Hawkins could *probably* do the job if she could complete the activities "intermittently while sitting, standing, walking or lying down." *Id.* (emphasis added)

⁵ As of the date of the hearing, she has not yet received a paycheck from Smart. (Tr. at 220, 288.)

On March 23, 2000, Expediter sent Ms. Hawkins a letter informing her that Smart was offering her the position of Customer Service/Surveyor. (Ex. 8l.) According to Dr. Morales' restrictions, she could only work four (4) hours per day and twenty (20) hours per week. (Tr. at 229-230; Ex. 8l.) Smart was aware of the restriction and was willing to accommodate it. *Id.*

Smart sent her a phone and headphones in the mail and Bell Atlantic installed another phone line in her home. (Tr. at 210.) Smart also mailed her a packet of information which included a script for her to read, a list of phone numbers to call, and a packet of forms to keep track of her hours and phone calls. (Tr. at 210-211; see Ex. 13B.) No one from Smart or Expediter has come to Ms. Hawkins' home to assist her in her employment. (Tr. at 214.)

In April, Ms. Rankis, an employee of Smart, called Ms. Hawkins and trained her by phone for approximately an hour and a half. (Tr. at 121, 214; Ex. 8l, 8n, 8o.) She reviewed the papers in the packet with Ms. Hawkins and explained to her what she needed to do. She also explained to Ms. Hawkins how to keep track of her time. (Tr. at 215.) Afterwards, Ms. Hawkins asked for more training, so the trainer called back the next morning and trained her for an additional half hour before Ms. Hawkins started work. *Id.* Ms. Hawkins received no other training or guidance from Smart except when she called with a question about a particular problem. (Tr. at 227.)

At the time of the hearing, Ms. Hawkins was using a script for foods and restaurants. (Tr. at 213.) She calls a restaurant from her list and asks a qualified individual for the following information: the name of the business, the name of the owner, the type of business, the current address, and the number of employees. *Id.* According to Ms. Hawkins, people do not want to give her this information over the phone. *Id.* She has talked with Linda McDonough, her current supervisor from Smart, several times about having difficulty with the work. (Tr. at 121, 215.) She still experiences problems with pronunciation and with understanding what other people say. (Tr. at 216.) Although she tries to verify spelling with the people she calls, the people do not want to verify their addresses or spell the words. (Tr. at 219.) Thus, her daughter must often help her spell the words she does not know. (Tr. at 218-219.)

Testimony of Chris Hoyer and Woodrow Holmes, Jr.

Chris Hoyer is the supervisor for Workers' Compensation case managers at NNS. (Tr. at 23.) He has worked in the Workers' Compensation department in some capacity since 1995. (Tr. at 24.) He oversees nine case managers, who handle claims adjustments on any injuries incurred by employees as a result of their work within NNS. *Id.* Hoyer also handles the initial litigation with the Department of Labor and prepares cases for further litigation. *Id.* According to Mr. Hoyer, there is no indication that Ms. Hawkins can return to work at NNS within her restrictions. (Tr. at 25.) Moreover, no work within her restrictions has been available to her at NNS since 1990. *Id.*

Genex Corporation (hereinafter “Genex”) originally contacted Mr. Hoyer to determine if NNS wanted “billing, pricing, medical case management, or vocational services.” *Id.* Mr. Hoyer decided to retain Genex on behalf of NNS because it offered a service for conventional vocational placement.⁶ *Id.* NNS contracted Genex for this service because Genex could provide home-based work for injured employees through Expediter. Expediter can make any accommodations that employees need to meet their physical limitations. (Tr. at 30.)

According to Mr. Hoyer, NNS identifies injured workers who are in “no-work status” to refer to Genex. (Tr. at 49.) He defined “no-work status” to mean that a doctor has determined that an injured worker with severe restrictions could not be placed in gainful employment in the open market. *Id.* However, Mr. Hoyer stated that the program is available to any worker who is “physically challenged” and not just to those workers who are paid permanent total disability.⁷ (Tr. at 53.) Mr. Hoyer stated that the Expediter job is “not your standard job that you go out and see every type of corporation on the corner that does this.” (Tr. at 49-50.) He was unfamiliar with this kind of job until Genex approached NNS with this option. (Tr. at 50.)

Woody Holmes, Ms. Hawkins’ case manager at NNS, has handled her case since June 1998. (Tr. at 55-56.) Mr. Holmes made the initial determination that Ms. Hawkins was a good candidate for referral to Expediter. (Tr. at 57.) Mr. Hoyer reviewed Ms. Hawkins’ case to determine whether it would be more “cost-effective to pay the high dollar and go through Expediter or...if [her] restrictions permit, go through a local vocational company.” (Tr. at 37.) He stated that NNS must evaluate the total liability and economic impact on the company in determining which workers to recommend. (Tr. at 54.) He made the ultimate decision to refer her case to Genex and Expediter. *Id.*

Leonora Holder, an employee of Genex, handled Ms. Hawkins’ case. *Id.* She evaluated the medicals, reviewed employment applications, and assessed Ms. Hawkins’ level of training. *Id.* After determining that Ms. Hawkins was an appropriate candidate for the program, Ms. Holder referred her to Expediter. *Id.* However, NNS retained control over the ultimate disposition of each case that it referred through Genex. (Tr. at 39.) Mr. Hoyer could stop the process at any time and withdraw an injured worker’s case from the Expediter program.⁸ *Id.*

⁶Mr. Hoyer defines conventional vocational placement as the process whereby a “vocational counselor meets with the person and tries to find [her] a job in the open market. A function outside [her] home.” Initially, Ms. Hawkins did not meet the criteria for conventional vocational placement. (Tr. at 27.)

⁷At the time of the hearing, Mr. Hoyer opined that NNS had referred thirty one of its injured employees to Genex. (Tr. at 36.)

⁸The Court uses the term “Expediter program” to signify the process of referrals from NNS through Genex to Expediter and Smart.

Mr. Hoyer discussed Ms. Hawkins' pay scale with Ms. Holder to determine what she should be paid. (Tr. at 51-52.) Genex determined that the market could sustain seven dollars per hour for this type of job and Mr. Hoyer accepted that rate as appropriate for Ms. Hawkins. *Id.* According to Expediter's literature, the new employer, which in this case would be Smart, has the option of increasing or decreasing Ms. Hawkins' wage at the end of the subsidization period. (Ex. 8b.)

According to Mr. Hoyer, Genex has never determined that an injured NNS employee was an inappropriate referral to Expediter. (Tr. at 39.) NNS pays \$5,500 to Genex for each case that Genex refers to Expediter.⁹ (Tr. at 42.) The fee covers the cost of retrieving the employee's file and for referring the case to Expediter. *Id.* According to the contract between Genex and NNS, Genex has no further involvement with the case after the referral to Expediter. (Tr. at 43.)

Expediter acts as an employment referral service to match injured employees with employment opportunities. (Tr. at 41.) Expediter has never contacted Mr. Hoyer about an inappropriate referral from NNS. (Tr. at 41-42.) Once Expediter places the injured employee with a company, it bills NNS based on the injured employee's training period with the new company. (Tr. at 44.) However, according to Mr. Hoyer, NNS does not have a contractual relationship with Expediter. (Tr. at 52.)

Mr. Hoyer stated that NNS pays Expediter "based on the training period, whatever the training period is. [NNS] pay[s] the claimant's wages and administrative costs that go with that." (Tr. at 44-45.) NNS pays 57% in administrative costs, which means that NNS pays \$1.57 to Expediter for every \$1.00 paid to the injured employee in wages. (Tr. at 45.) An injured NNS worker's training period is a maximum of 500 hours because that "[is] the program [NNS] bought into from Genex."¹⁰ *Id.* NNS also pays to have the phone line installed in the injured employee's home and pays for the long-distance phone usage and mailing costs during the training period. (Tr. at 45-46.) Moreover, it pays for any reasonable accommodations that the injured employee might need to operate the phone. *Id.*

Expediter ultimately referred Ms. Hawkins' case to Smart. (Tr. at 35.) Mr. Hoyer stated that he was not aware of any cases where an injured employee from NNS was referred through Expediter to an employer other than Smart. (Tr. at 36.) NNS does not have a contractual relationship with Smart and does not pay anything directly to the company for services, supplies, or subsidized wages. (Tr. at 47, 52.) After Genex receives its fee, NNS pays all other amounts directly to Expediter. *Id.*

Testimony of Lenora Holder

⁹Where the case does not proceed to the referral stage, Genex receives \$300. (Tr. at 43.)

¹⁰According to Expediter's literature, a "minimum of 500 hours...must be supplemented for employees who have not had prior telecommunications experience." (Cx. 18-2.)

Lenora Holder worked as a vocational case manager at Genex for two years until she left Genex for medical reasons. (Tr. at 70, 78.) At Genex¹¹, she assisted clients like NNS by providing vocational job training to their injured workers in the return-to-work process. *Id.* Typically, she analyzed cases to determine whether she should refer them to Expediter. (Tr. at 72.) She determined whether cases qualified for referral by doing a vocational assessment, meeting with the client, meeting with the injured worker, and contacting the worker's physician for approval. *Id.* According to Ms. Holder, she cannot make the referral without first attempting to meet with the injured worker. (Tr. at 73.) She must also receive the doctor's approval for the referral to proceed. *Id.*

She received Dr. Morales' approval for the job description on August 18, 1999.¹² (Ex. 6a.) She attempted to contact Ms. Hawkins directly and through her attorney. (Tr. at 73.) On November 1, 1999, Mr. Camden, Ms. Hawkins' attorney, informed Ms. Holder that she was not to meet with Ms. Hawkins or make any contact with her. (Tr. at 74.) She relied on Ms. Hawkins' employment application for NNS and her hourly-employee profile to discern some of her employment background and education. *Id.* From Ms. Hawkins' employment application for NNS, Ms. Holder determined that Ms. Hawkins had graduated from high school. (Tr. at 75; Ex. 4.) She determined that Ms. Hawkins' employment history consisted of work as a maid, assembler, and a machine operator. (Tr. at 75-76; Ex. 6c.) At NNS, Ms. Hawkins had worked as a cleaner, which is an unskilled position. (Tr. at 76.)

Based on Ms. Hawkins' employment application and Dr. Morales' execution of the job analysis, Ms. Holder considered the position of telephone surveyor as suitable employment for Ms. Hawkins. *Id.* She determined that Ms. Hawkins could perform the job within her home and, in the process, gain some expandable skills. *Id.* According to Ms. Holder, those skills included "interpersonal skills, customer service skills, reasoning, and data-entry skills." (Tr. at 77.) She stated that her opinion that the position would be suitable for Ms. Hawkins would not change even if Ms. Hawkins was reading at a second-grade level and had not graduated from high school. *Id.* She stated that Expediter could modify her scripts to accommodate her reading level. *Id.* She did not factor in the use of Ms. Hawkins' medications because she did not have that information available when she compiled her report. (Ex. 6d.)

In assessing an individual's suitability, Ms. Holder most often evaluates the level of training and monitoring an individual will need in order to do the job. (Tr. at 87.) Of all the cases that she handled, Ms. Holder had only one case where she determined that the individual could not work for Smart. (Tr. at 87-88.) In that case, the individual was incarcerated. *Id.* The initial training of an individual reading

¹¹The Court excluded the Genex sales flyer marked Cx. 26 because Claimant submitted the document after the record was closed.

¹²According to a letter from Expediter, the job analysis approved by Dr. Morales was dated July 12, 1999. (Ex. 8j.)

from a first- or second-grade level should take a couple of hours. (Tr. at 84-85.) After the initial training date, a supervisor monitors the individual and gives her additional training as needed. (Tr. at 85.) All training occurs by telephone. (Tr. at 85.)

Testimony of Janet Winschel

Leonard and Leona Felman are the owners and stockholders of Expediter, which has been in existence since 1990. (Tr. at 95.) Expediter is located in Pittsburgh, Pennsylvania. *Id.* It has eleven full-time employees and one part-time employee. *Id.*

Janet Winschel has been an employee of Expediter since September 1992 and is an expert in vocational placement. (Tr. at 90, 94.) As general manager of Expediter, Ms. Winschel is “responsible for hiring, training, and supervising the administrative job development staff.” (Tr. at 94.) She meets with injured workers and conducts vocational assessments. *Id.* She performs site assessments, prepares job analyses, and does labor-market studies. *Id.* She also researches and implements “accommodations and ergonomics to assist injured workers with their re-entry into the workforce.” *Id.*

Expediter works with Genex through the Placement Partnership Program. (Tr. at 95-96.) Genex acts as the “vocational rehabilitation arm” by receiving referrals from clients, conducting vocational assessments, and handling medical management. (Tr. at 96.) Genex utilizes Expediter as “a resource to locate at-home employment for [] injured worker[s].” *Id.* According to its literature, Expediter acts as an “accommodations consultant” between the injured employee and the new employer. (Ex. 8.) Expediter bills Genex \$3,150 for each case it accepts on referral. (Tr. at 98.) According to Ms. Winschel, Expediter’s services are available to anyone who is willing to pay that fee. (Tr. at 114.)

Genex refers employees to Expediter Corporation by filling out a referral form. (Tr. at 99.) Typically, Genex completes a vocational assessment or hypothetical evaluation of the injured worker. *Id.* Then, Genex seeks approval of job analyses through IME¹³ positions. Finally, it refers the case to Expediter. *Id.*

Expediter does not have a contractual relationship with NNS. (Tr. at 98.) It does not have any direct contact with NNS to determine who should be referred to Expediter. *Id.* Once Expediter receives a file, Ms. Winschel reviews the information provided to make an independent determination that the individual can perform the job. (Tr. at 99.)

¹³The Court takes official notice of the fact that “IME” is the standard abbreviation for “independent medical examiner.”

According to Expediter literature, an individual must have an IQ of eighty or clearance through a vocational profile in order to be a candidate for referral. (Tr. at 139; Cx.

18-1.) An individual's vocational profile includes some "indication, documentation, or knowledge that the person possesses the reading, writing, and communications skills necessary to do that job." *Id.* Ms. Winschel opined that an individual's prior work experience and the traits developed during the course of that experience provide the best indication of an individual's capabilities. *Id.* She acknowledged that Ms. Hawkins has no prior telecommunications experience. (Tr. at 140.)

The injured worker is on Smart's payroll from the first day that the individual starts the position. (Tr. at 100.) Smart is the employer "of record." *Id.* Although it pays the injured worker, Expediter reimburses Smart for the hourly rate and the cost for employing the individual, which amounts to the worker's wages plus an administrative fee that equals a 57 percent markup on the hourly rate. (Tr. at 100, 133.) Expediter then bills NNS for the amount of the reimbursement to Smart. (Tr. at 100.) Expediter classifies these fees as "pass-through charges." (Tr. at 101.) The average subsidization lasts for 500 hours. (Tr. at 105.)

The subsidization period allows Smart the opportunity to conduct an audit of the work the injured worker has performed. *Id.* Every employee completes a Telecommunicator Daily Record, which shows how many calls the individual has placed, the result of the call, and the amount of time spent on the phone. *Id.* Smart compares that information to the phone bills to ensure that the employee has accurately recorded the information and that the employee has met the minimum requirements of the job. (Tr. at 105-106.) The telephone surveyor must either complete five to ten surveys per hour or thirty minutes of contacts¹⁴ for each hour worked. (Ex. 8d.) Smart attempts to complete three audits on an injured worker before it assumes the costs of employing the individual. (Tr. at 105.) If the employee meets the minimum requirements of the position based on completed paperwork and completed audits, Smart assumes the cost of employing the individual. (Tr. at 107.) In its literature, Expediter emphasizes the fact that work with the new employer will be employment at will, which means that the employer and the employee can end or change the employment relationship at any time with or without cause. (Ex. 8a.)

According to Ms. Winschel, an appropriate candidate for at-home employment would be an individual who "has not been in the workforce for a long period of time and needs the opportunity to get back to work to get into that cycle of working and developing the confidence

¹⁴According to Expediter's literature, a contact "is a dialed number which results in securing survey information or documenting that the number [is] wrong, disconnected, not interested, moved, out of business, etc." (Cx. 18-45.)

needed, because the job is a very good transitional situation.” (Tr. 124-125.) She opined that the job would be appropriate for people who had been “voked¹⁵ before and it was not successful.” (Tr. at 124.) She stated that an individual who performs as a survey worker for Smart develops personal skills such as developing and compiling data and talking on the telephone. (Tr. at 123.) The individual also develops confidence and self-esteem. *Id.*

The training supervisor of Smart “contacts the injured worker, reviews all the material..., describes [it] all, [and] reviews the script with the person. They will do some role-playing to make sure the person can read the script effectively, go over it many times to make sure [the person] understand[s] how to complete the paperwork and then [the person] begin[s].” (Tr. at 149.) Ms. Winschel believed that the average training period lasted an hour to an hour and a half; however, she stated that the training period could last longer depending upon the individual’s learning curve. *Id.* She stated that Ms. Hawkins received training on April 19th, April 20th, and May 4th. (Tr. at 150.)

Expediter refers approximately forty percent of its total referrals to Smart. (Tr. at 136.) Initially, every individual is referred for the surveyor position. *Id.* Ms. Winschel typically refers to Smart individuals who lack skills that another company could immediately utilize to increase their productivity. (Tr. at 144.) According to Expediter, the surveyor position is classified as “subsedentary.” (Tr. at 145.) Expediter, who created this term, defines it as a classification below sedentary because the position requires lifting five pounds or less and allows complete freedom of movement. *Id.*

Ms. Winschel stated that Expediter referred approximately one hundred to one hundred and twenty individuals to Smart in 1999. (Tr. at 136.) Although she could not state how many still worked there, she did state that five percent of the total referrals to Smart remain in its employ after the subsidization period. (Tr. at 137.) Forty percent of the people that Expediter refers do not start the job with Smart. (Tr. at 152.) She stated that positions at Smart are available to the general public. (Tr. at 120.)

Testimony of Stacey Marchione

Stacey Marchione is the owner and president of Smart Telecommunications, which is located in Ms. Marchione’s home in Wexford, Pennsylvania. (Ex. 14-3, 14-9.) Smart employees provide telecommunications services from home. (Ex. 14-4.) The corporation handles calls that involve script writing, surveys, market research, lead generation, and appointment setting. *Id.*

¹⁵The Court assumes “voked” refers to process Mr. Hoyer described as conventional vocational placement.

According to Ms. Marchione, the home based nature of Smart is unusual in the telecommunications business because many telecommunication and telemarketing companies have a site where their employees work with automated dialers.¹⁶ (Ex. 14-17.)

Smart currently has fifty-seven employees. (Ex. 14-4.) Smart finds new employees by advertising at the Carnegie Job Center, through the Pittsburgh Post Gazette and the Pennsylvania Welfare to Work Program, and through local unemployment offices. (Ex. 14-11.) The majority of Smart's employees work twenty hours a week; however, some work as few as ten hours per week and some work forty hours per week. (Ex. 14-13.) The individual employee determines which hours she will work to meet her work week. (Ex. 14-14.) Approximately thirty of the fifty seven employees work as telephone surveyors for Smart. (Ex. 14-35.) Expediter referred approximately sixty five percent of the individuals who are currently employed as telephone surveyors. (Ex. 14-51.) According to Ms. Marchione, the remaining thirty five percent of telephone surveyors "come from the newspaper, word of mouth, the Carnegie job center, unemployment offices and welfare to work referrals." (Ex. 14-51.)

In 1998, Expediter referred two hundred and forty people to Smart. (Ex. 14-5.) Of those referrals, one hundred and fifty two people actually started the job. *Id.* Only twenty two people completed five hundred hours of training. *Id.* Out of the twenty two people that completed the training, seven people stayed at Smart and Smart assumed the costs of employing them.¹⁷ *Id.*

Ms. Marchione stated that a good telephone surveyor has a "decent sounding phone voice, friendliness, a good [] attitude and just effort. It's an effort job." (Ex. 14-41.) The employee training manual includes a section describing the use of an employee's voice as a telephone skill. (Ex. 18-15.) The manual states that "95% of the message's believability is communicated by the way the message is presented, that is, how you sound. You should sound friendly, knowledgeable, and confident in your presentation" *Id.* Smart encourages its employees to

3. Recite tongue twisters until you are mistake free.
4. Adjust your rate of speech (fast to slow) to match that of the person you are calling.
5. Sit up straight.
6. Raise or lower your voice to make a point.
7. Pause during the conversation for impact.

¹⁶Ms. Marchione stated that she had knowledge of five other companies in the United States that operated similarly to Smart. (Ex. 14-16, 14-17.)

¹⁷According to Ms. Marchione, Smart made offers to more than seven of the twenty two people who completed the training period, but those people chose to leave Smart for other opportunities. (Ex. 14-5.) She stated that approximately fifteen to seventeen people were offered jobs with Smart. (Ex. 14-40.)

Id.

A telephone surveyor must also be able to read. (Ex. 14-41.)

The general training program at Smart involves one-on-one training with a supervisor and on-the-job training. (Ex. 14-11.) According to Ms. Marchione, Smart formally trains its employees about thirty minutes to an hour every week and also on an as-needed basis. (Ex. 14-12.) On-the-job training means the person learns the job by actually doing the work. (Ex. 14-11.) The five hundred hour training period encompasses both types of training. *Id.*

Smart requires its employees to make a minimum of five to twelve completed surveys per hour or show that they have been on the phone at least thirty minutes of each hour attempting to complete surveys. (Ex. 14-20.) Smart uses the employee's phone bills to verify that the employee has been on the phone thirty minutes per hour making phone calls. *Id.*

Ms. Marchione stated that Ms. Hawkins had difficulty comprehending the original work that Smart gave her to do. (Ex. 14-23.) Smart notified Expediter about the need for an accommodation of the script given to Ms. Hawkins. *Id.* Expediter hired an expert to modify the script to a lower reading level. *Id.* Ms. Marchione stated that the expert modified the script to a first- to second-grade reading level. *Id.*

According to Ms. Marchione, Smart has fired employees during the subsidized training period where the employees were "blatantly not filling out their paperwork properly, they [were] not on the phone when they said they [were] on the phone. They [were] not working their hours. We have had some employees, you know, just use profanity every time we call them...." (Ex. 14-25, 14-26.) However, Smart gives its employees a minimum of two warnings before termination. (Ex. 14-26.) Smart has also terminated some people after the five hundred hours of training for poor performance resulting from an inability to meet productivity goals. (Ex. 14-40, 14-41.)

Testimony of Francis C. DeMark

Francis DeMark is certified by the State of Virginia and the United States Department of Labor in vocational rehabilitation. (Tr. at 158.) He reviewed Ms. Hawkins' medical records and her rehabilitation records, and he has met with Ms. Hawkins on two different occasions. (Tr. at 159-160.)

In February 1997, Sue Barnes, a certified vocational evaluator and employee of Mr. DeMark, tested and evaluated Ms. Hawkins. (Tr. at 160.) Ms. Barnes administered the Slosson Intelligence Test, which is a verbal IQ test. *Id.* Ms. Hawkins scored an IQ of seventy-one. *Id.* According to Mr. DeMark, an individual with an IQ of sixty-nine would be considered mentally retarded. (Tr. at 163.) Ms. Barnes also administered the Wide-Range Achievement Test, which measures basic reading, spelling, and math. (Tr. at 160.) Ms. Hawkins' score reflected a second-grade reading level and a first-grade spelling and math level. (Tr. at 160-161.) On the Raven Progressive Matrices, another IQ

test, Ms. Hawkins scored below the fourth percentile. (Tr. at 161.) Based on that score, Ms. Hawkins is considered “intellectually impaired.” *Id.* Mr. DeMark reported that Ms. Hawkins “would be considered illiterate. Her overall intelligence would be classified as borderline.” (Cx. 3-1.)

During an interview with Mr. DeMark in April 2000, Ms. Hawkins stated that she had received her GED.¹⁸ (Cx. 19-6, 19-7.) According to Mr. DeMark, the test for a GED requires somewhere between an eighth- and a tenth-grade level of education to pass. (Cx. 19-8.) In his professional opinion, Mr. DeMark determined that it would be impossible for Ms. Hawkins to pass the GED test. (Cx. 19-9.) He believed that Ms. Hawkins had misrepresented her level of education because she was embarrassed about not having a high school diploma. *Id.*

Mr. DeMark opined that the position with Smart Telecommunications would not be considered competitive employment. (Tr. at 165.) He stated that “any ability that Ms. Hawkins might possess to perform the duties involved in the Expediter Project does not indicate that she is able to compete for any other positions in the local labor market.” (Cx. 21-3.) Moreover, Ms. Hawkins would not develop any transferrable skills that might lead to other competitive employment. (Tr. at 166.)

He determined that Expediter and Smart created a very specific type of job for individuals who cannot work elsewhere. (Tr. at 165.) Smart structured the position so that an individual would not have to use any type of modern technology, except for the telephone, to perform the duties of the job. *Id.*

In his report, Mr. DeMark stated that

[t]he Expediter project goes far beyond anything that I have seen in regard to sheltered or benevolent employment. Quite to the contrary, I have never seen anything like the Expediter project where one company pays another to hire only their permanently and totally disabled workers with the intent of being able to question the injured worker’s status as being permanently and totally disabled. (Cx. 21-3.)

He summarized his opinion by stating that “Ms. Hawkins’ exertional and non-exertional disabilities, slurred speech, lack of transferable skills, and educational deficits combine in such a way that it is my opinion that Ms. Hawkins is unable to earn wages in a competitive labor market.” (Cx. 21-4.)

¹⁸In 1997, Ms. Hawkins stated that she left school in the 10th grade. (Cx. 19-7.)

Discussion

Where it is uncontroverted that Claimant cannot return to her usual work, she has established a *prima facie* case of total disability. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). In this case, Employer admits that there is no indication that Claimant can return to work within her restrictions. (Tr. at 25.) Moreover, no work within Claimant's restrictions has been available to her at NNS since 1990. *Id.* Therefore, Claimant has established a *prima facie* case of total disability.

The burden shifts to Employer to demonstrate the availability of suitable alternate employment within Claimant's restrictions and which is available upon a reasonably diligent search. Newport News Shipbuilding and Dry Dock v. Tann, 841 F.2d 540, 542 (4th Cir. 1988); Trans-State Dredging v. Benefits Review Board (hereinafter "Tarner"), 731 F.2d 199, 201 (4th Cir. 1984.)

Real Employment

The fact that Claimant works after her injury does not necessarily preclude a finding of total disability. Haughton Elevator Co. v. Lewis, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1997, *aff'g* 5 BRBS 62 (1976)); Walker v. Pacific Architects & Eng'rs, 1 BRBS 145, 148 (1974); Offshore Food Serv. v. Murillo, 1 BRBS 9, 14 (1974). However, the Board has emphasized that circumstances which warrant an award of total disability, concurrent with a period where Claimant is working, are the exception and not the rule. Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141, 145 (1980); Chase v. Bethlehem Steel Corp., 9 BRBS 143, 145-146 (1978); Ford v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 687, 690-691 (1978).

An award of total disability concurrent with continued employment has been limited to two situations. In this case, the pertinent one is the "beneficent employer" or "sheltered employment" situation, where Claimant's post-injury employment is due solely to the beneficence of the employer and therefore is not representative of Claimant's true wage-earning capacity. Walker, *supra* at 147-48; see also Proffitt v. E.J. Bartells Co., 10 BRBS 435, 440 (1979). Wage-earning capacity "means [the] ability to earn in the open market, not [the] ability to secure exceptional consideration from a sympathetic employer." Walker, *supra* at 147 (citing United Engineering Co. v. Pillsbury, 92 F. Supp. 898 (D.C. Cal. 1950)).

Sheltered employment has been held to be insufficient to establish suitable alternate employment. The Board has found "sheltered employment" where "claimant is physically incapable of performing the duties required by his job but nevertheless receives wages, or where the job is unnecessary to employer's operations and merely created in order to place claimant on the payroll." Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10, 14 (1980).

In order to determine whether the position with Smart constitutes sheltered employment, the Court must first ascertain which entity constitutes Claimant's true employer. The Court takes official notice of the definition of employer as "a person, business firm, etc. that hires one or more persons to work for wages or salary." (Webster's New Word College Dictionary 1996.) In this case, NNS made the initial determination to refer Claimant's case to the Expediter program. (Tr. at 54.) After NNS's initial referral, Genex and Expediter made separate determinations that Claimant was an appropriate candidate for the program. (Tr. at 38, 99.) The Court notes that NNS retains ultimate control over the disposition of each case that it refers into the Expediter program. (Tr. at 39.) According to Mr. Hoyer, he "can stop [the process] at any point [he] want[s]." *Id.* Based on this testimony, it appears that NNS could have stopped the process and withdrawn Claimant from the program even after Smart offered her a position. (Tr. at 39.)

In general, NNS pays Genex \$5,500 for each case Genex refers on to Expediter. (Tr. at 42.) In turn, Expediter bills Genex \$3,150 for each case it accepts on referral. (Tr. at 98.) Out of the thirty one referrals NNS has made to Genex, the Court notes that Genex has never determined that one of them was inappropriate for referral to Expediter. (Tr. at 36, 39.) Moreover, Expediter has never contacted NNS about an inappropriate referral. (Tr. at 41-42.)

This referral process acts as a substitute for the traditional hiring process. The approval of referrals from NNS by Genex, Expediter, and Smart is perfunctory. Genex and Expediter routinely approve referrals made by NNS. Indeed, of the cases that Ms. Holder reviewed for Genex, she had only one case where she determined that an individual could not work for Smart. (Tr. at 87-88.) In that case, the individual was incarcerated. *Id.*

In a letter from Expediter to Claimant, Expediter stated that Smart was "prepared to offer [Claimant] a position upon successful completion of the interview." (Ex. 8c.) All of the evidence suggests that Smart offered the telephone surveyor position to any referral who actually submitted to the telephone interview and wanted the position at Smart.

By referring Claimant's case to the Expediter program, NNS made the critical decision that led to Smart hiring Claimant. Barring an extreme circumstance¹⁹, it appears that Smart would hire anyone who NNS referred to the Expediter program. Moreover, NNS made the decision regarding how much Claimant should be paid during the subsidization period. (Tr. at 51-52.) It also agreed to pay Claimant's wages and the costs of accommodating her disability for the first five hundred hours of her employment. (Tr. at 44-46, 100.) Based on this information, the Court considers NNS to be Claimant's true employer for the duration of the subsidized period with Smart.

¹⁹Expediter stated that it could not accommodate individuals with "severe voice diction impediments (requiring the use of voice-activated computers)." (Cx. 18-1.)

The Court must now determine whether the position with Smart constitutes sheltered employment. The Board has found “sheltered employment” where “claimant is physically incapable of performing the duties required by his job but nevertheless receives wages, or where the job is unnecessary to employer’s operations and merely created in order to place claimant on the payroll.” Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10, 14 (1980). In this case, Claimant’s work as a telephone surveyor is unnecessary to NNS and its operation.

If NNS had manufactured a similar position and placed Claimant directly on its payroll, it would be immediately apparent that NNS had created sheltered employment for Claimant. Cf. Bilicic v. Wilmington Marine Service, 23 BRBS 23, 26 (1989) (finding that the job was not manufactured to support an application for modification). In this case, NNS is attempting to use third parties to obscure the fact that it has placed Claimant on its payroll for five hundred hours of her employment at Smart to do work that is completely unnecessary to NNS’s operation. Although NNS has attempted to use this referral process to cloak the position at Smart with a certain legitimacy, the Court finds little difference between the situation where NNS manufactures a position in its own company and the present case where it pays Smart to hire its injured worker for five hundred hours of work.

In this case, the evidence does not show that NNS has made a good faith effort to have Claimant perform a necessary job for NNS. Cf. Bilicic, *supra* (finding that employer made a good faith effort to have claimant perform a job that needed to be done). Instead, the Court finds that NNS is acting in bad faith by referring its injured workers into the Expediter program. Mr. Hoyer stated that NNS identifies injured workers who are in “no-work status” to refer to Genex. (Tr. at 49.) Based on Mr. Hoyer’s definition, “no-work status” refers to cases where a doctor has determined that an injured worker with severe restrictions could not be placed in gainful employment in the open market. *Id.* In other words, NNS uses the services offered by Genex to find employment for injured workers who would be considered totally disabled based on conventional vocational placement.

In his report, Mr. DeMark stated that he had “never seen anything like the Expediter project where one company pays another to hire only their permanently and totally disabled workers with the intent of being able to question the injured worker’s status as being permanently and totally disabled.” (Cx. 21-3.) The Court finds Mr. DeMark to be a credible expert witness. While there is no evidence that NNS refers only its permanently and totally disabled workers to the Expediter program, there is evidence in this case that NNS paid Smart to hire Claimant, a permanently and totally disabled worker, with the intent of questioning her status as permanently and totally disabled.

In order to have access to an Expediter employment opportunity like the position at Smart, Expediter requires NNS to supplement a minimum of five hundred hours of employment and associated costs for employees who do not have prior telecommunications experience. (Cx. 18-2.) In other words, Smart will only employ someone like Claimant because it has the expectation that NNS will reimburse Smart for a minimum of five hundred hours. It is a logical conclusion, then, that if NNS chose to stop subsidizing Claimant’s wages and associated costs prior to the first five hundred hours,

Smart would not assume the costs of employing Claimant. Therefore, Claimant's position at Smart is available only through the beneficence of NNS. For all of the foregoing reasons, the Court finds that the position at Smart constitutes sheltered employment.

Suitable Alternate Employment

Assuming *arguendo* that the position with Smart does not constitute sheltered employment, the Court must determine whether NNS has shown that the position constitutes suitable alternate employment for Claimant. In order to meet this burden, Employer must show the availability of job opportunities within the geographical area in which Claimant was injured or in which she resides, which she can perform given her age, education, work experience and physical restrictions, and for which she can compete and reasonably secure. Tann, supra; Tarner, supra; Newport News Shipbuilding and Dry Dock v. Director, OWCP, 592 F.2d 762, 765 (4th Cir. 1979).

To determine whether a proposed job is suitable for Claimant, the Court must consider Claimant's technical and verbal skills, as well as the likelihood that a person of Claimant's age, education, and employment background would be hired if he or she diligently sought the proposed job. Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988); Stevens v. Director, OWCP, 909 F.2d 1256, 1258 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991).

In this case, Lenora Holder, the vocational case manager from Genex, did a vocational assessment to determine whether Claimant qualified for referral to Expediter. (Tr. at 72, 76, 99.) She relied on Claimant's employment application with NNS and her hourly-employee profile to discern her employment background and education. (Tr. at 74.) Ms. Holder determined that Claimant had graduated from high school and that she had demonstrated the necessary skills to perform the position at Smart successfully. (Tr. at 76.) She stated that her opinion would not change even if Claimant was reading at a second-grade level and had not graduated from high school because Expediter could modify her script to accommodate her reading level. (Tr. at 77.)

Although Ms. Holder is a credible witness, the Court is not persuaded by her opinion. Ms. Holder never had the opportunity to meet with Claimant to conduct a vocational assessment. She relied extensively on Claimant's employment application with NNS, which stated that Claimant had graduated from high school. However, Claimant testified that she did not graduate from high school. (Tr. at 205.) She stated that she earned her GED "with help" after taking the test approximately four times. (Tr. at 225-226.) Ms. Holder gleaned only the most cursory facts about Claimant's work history and skill level from her employment application.

On the other hand, the Court finds Mr. DeMark's vocational assessment more persuasive because he actually reviewed Claimant's medical records and rehabilitation records, met with Claimant on two different occasions, and ordered the administration of several tests to measure Claimant's vocational abilities. (Tr. at 159-160.) Based on the results of those tests, Mr. DeMark determined that

Claimant “would be considered illiterate. Her overall intelligence would be classified as borderline [mentally retarded.]” (Cx. 3-1.) Mr. DeMark determined that it would be impossible for Claimant to pass the GED test, which requires between an eighth- and tenth-grade education to pass. (Cx. 19-9.) He opined that Claimant misrepresented her level of education because she was embarrassed about not having a high school diploma. *Id.*

Expediter stated in its literature that a person must have an IQ of eighty or clearance through a vocational profile in order to be a candidate for referral. (Tr. at 139; Cx. 18-1.) The vocational profile should include some “indication, documentation, or knowledge that the person possesses the reading, writing, and communications skills necessary to do that job.” *Id.* According to Ms. Winschel, a person’s prior work experience and the traits developed through that experience provide the best indication of an individual’s capabilities. *Id.*

Whether Claimant received her GED “with help” or misrepresented her level of education, the Court finds that Claimant does not possess the intellectual or vocational ability to meet Expediter’s minimum requirements. According to the Slosson Intelligence Test, which is a verbal IQ test, Claimant’s IQ registers at seventy-one. (Tr. at 160.) Ms. Winschel, the general manager of Expediter, acknowledged that Claimant has no prior telecommunications experience. (Tr. at 140.) Moreover, nothing in Claimant’s prior work experience suggests that she has the necessary capabilities for telecommunications work. Her prior experience consists of work as a maid, assembler, machine operator, and cleaner. (Tr. at 75-76; Ex. 6c.) None of Claimant’s previous positions required extensive use of Claimant’s verbal skills or the same degree of interaction with people that the position at Smart requires.

According to Smart’s employee training manual, the position of telephone surveyor requires the use of an employee’s voice as a telephone skill. (Cx. 18-15.) The manual states that “95% of the message’s believability is communicated by the way the message is presented, that is, how you sound. You should sound friendly, knowledgeable, and confident in your presentation.” *Id.* In order to achieve that effect, Smart encourages techniques like adjusting the rate of speech, sitting up straight, raising and lowering the voice to make a point, and pausing for impact. *Id.*

Although Ms. Marchione stated that a good telephone surveyor has “a decent sounding phone voice, friendliness, a good attitude, and just effort,” it is clear that the position at Smart requires more advanced verbal skills than Claimant possesses. Claimant testified that she talked with her supervisor at Smart several times about her difficulty with the work. (Tr. at 121, 215.) She stated that she still has difficulty with pronunciation and with understanding what other people say. (Tr. at 216.) She has difficulty persuading people to give her the necessary information and getting them to verify the correct spellings of words. (Tr. at 213, 219.) Claimant’s “difficulties” were apparent to the undersigned at the hearing.

The position also requires basic reading and writing skills that Claimant does not possess. According to Mr. DeMark's vocational testing, Claimant's scores reflect a second-grade reading level and a first-grade spelling level. (Tr. at 160-161.) Ms. Marchione stated that Expediter hired an expert to modify Claimant's script to a first- to second-grade reading level. (Ex. 14-23.) While the modification may have resolved Claimant's basic reading problem, she still struggled with spelling and often needed her daughter to help her spell words she did not know. (Tr. at 218-219.) Based on the foregoing reasons, the Court finds that the position at Smart is not suitable alternate employment for Claimant.

Finally, the Court notes that Mr. DeMark's expert opinion is highly persuasive on the issue of whether any suitable alternate employment exists for Claimant. In his report, Mr. DeMark stated that Claimant's "exertional and non-exertional disabilities, slurred speech, lack of transferable skills, and educational deficits combine in such a way that it is [his] opinion that Ms. Hawkins is unable to earn wages in a competitive labor market." (Cx. 21-4.) Therefore, as Employer has failed to meet its burden of showing suitable alternate employment, the Court finds that Claimant is permanently and totally disabled.

Order

Accordingly, it is hereby ORDERED that:

1. Payments made through April 18, 2000 are not in issue.
2. Employer, Newport News Shipyard and Dry Dock Co., is hereby ordered to pay Claimant, Celestine Hawkins, permanent total disability payments of \$238.87 per week from April 19, 2000 and continuing.
3. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries.
4. Employer shall receive credit for any compensation previously paid.
5. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).
6. Claimant's attorney, within twenty (20) days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

RKM/kap
Newport News, Virginia

RICHARD K. MALAMPHY
Administrative Law Judge